90-1638

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO._____

HELEN LAND, *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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October_____, 1991

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT A POLICE OFFICER MAY TAKE A BLOOD SAMPLE FOR LATER USE IN A CRIMINAL PROSECUTION FROM AN UNCONSCIOUS PERSON WHO IS NOT UNDER ARREST, NOT UNDER SUSPICION OF COMMITTING A CRIME, AND WITHOUT KNOWLEDGE THAT A CRIME MAY HAVE BEEN COMMITTED?

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COMMONWEALTH OF KENTUCKY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, HELEN LAND, respectfully prays that a writ of certiorari issue to review the final Opinion of the Court of Appeals of Kentucky entered in this proceeding on April 27, 1990.

QUESTION PRESENTED FOR REVIEW

Whether Petitioner is entitled to a review by this Court on Writ of Certiorari, of the decision by the Court of Appeals of Kentucky, upholding the lower court, and introducing the results of a blood test in a prosecution for manslaughter in the second degree, said blood being taken from her at a time when she was unconscious, not under arrest, and when there was no evidence that a crime had been committed, and when there was no evidence that she might be intoxicated and when she was not under suspicion of committing any crime.

OPINIONS BELOW

The original Final Judgment of conviction was entered on April 20, 1989, by the Fayette Circuit Court, Criminal Branch, Commonwealth of Kentucky, and it appears in the Appendix at page 1a-4a. The case was appealed to the Court of Appeals of Kentucky and the decision affirming the lower court was entered on April 27, 1990, and it appears in the Appendix at page 5a-9a. The Petitioner requested a rehearing by the Court of Appeals which was denied on July 20, 1990, and it appears in the Appendix at page 10a. The Petitioner requested a Discretionary Review by the Supreme Court of Kentucky, which was denied on December 19, 1990. That Order appears in the Appendix at page 11a.

JURISDICTION

On December 19, 1990, the Supreme Court of Kentucky denied a request for Discretionary Review. On January 16, 1991, the Fayette Circuit Court entered an Order continuing the imposition of sentence until March 22,

1991, for the purpose of allowing the petition to this Court for a writ of certiorari, Appendix at page 12a. This Petition for writ of certiorari was filed within that 90 day period. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

This case involves U.S. CONST. Amend. IV, V, and XIV, the text of which is set forth in Appendix at page 13a-14a, and Section 10 and 11 of the Constitution of Kentucky, the entire texts of which are set forth in Appendix at page 14a-15a. It also involves the interpretation of Kentucky Revised Statutes 186.565 and 189.520 which are set forth in Appendix at page 15a-19a and 19a-21a.

STATEMENT OF THE CASE

PREFACE

This case concerns the admission into evidence of the results of a blood alcohol test at a criminal trial for second degree manslaughter. The blood was taken at a time when the Petitioner was unconscious and incapable of giving consent and at a time when she was not under arrest, not under suspicion, and a time when there was no evidence that a crime had even been committed. Prior to the trial, the Court denied motions to suppress based upon violations of her 4th Amendment rights under the United States Constitution and Bill of Rights and her rights against unreasonable search and seizure and against self incrimination all as guaranteed by Section 10 and Section 11 of the Kentucky Constitution. (Tape No. 22-4-89-VCR-021; 08:34:20) Objections were again made during trial and again were denied.

(Tape No. 22-4-89-VCR-021; 08:37:15) (Tape No. 22-4-89-VCR-021;10:32:42).

STATEMENT OF THE CASE

Helen Land, 25 years old, was convicted in the Fayette Circuit Court of Kentucky of second degree manslaughter, assault 4th degree, and driving an automobile under the influence of intoxicating liquor, all resulting from an automobile accident in which one person died and several were injured.

Helen was found at the accident scene lying in the middle of the road, severely injured and unconscious. There was no evidence to show who was driving the two pick up trucks that had collided on a rural road. All the other occupants of both vehicles were either outside their vehicles or had been thrown out by the force of the collision.

Helen was taken to a hospital in Lexington by an emergency care unit. She suffered from a cerebral contusion and multiple trauma as a result of a severe closed head injury. She also suffered fractures of her right clavicle and right zygoma as well as multiple soft tissue injuries.

When she arrived at the hospital, she was moved into the emergency room and was placed on a stretcher.

Meanwhile, Police Officer Bostrom arrived on the accident scene at about 10:30 p.m. and took charge of the investigation. Sometime shortly after he arrived, he called Officer Embree, who was not at the scene, and asked that he assist him by going to the hospital and obtaining a blood sample from Helen.

The state of mind of Officer Bostrom at the time he made this request is shown by the following testimony:

"Q. Did you have any belief, have any reason, to believe, did you have a feeling, that this accident may have been caused in part due to some intoxication either by substance abuse or alcohol?

A. No sir, at that time, I did not.

Q. Trying to ask the officer if he had focused his attention to the driver for criminal activities?

A. At that point, no sir. It was a couple of days after this all happened that I thought that we had an answer as to how the wreck occurred."

Officer Embree arrived at the hospital and found Helen still lying on the stretcher. He had no instructions to arrest her and he did not arrest her. He attempted to talk to her to get permission to take a blood sample. He stated that although she was not comatose, she was still not capable of carrying on a conversation; she didn't open her eyes; and didn't respond to questions. He was therefore unable to ask her permission to take a blood test.

He then asked Deborah Turner, an employee of the hospital whose job it was to take blood, to take a blood sample and he provided the blood kit for her. She first took her own sample for diagnostic purposes and kept that sample in her own containers. This blood was never given to the officer and no hospital blood test was ever sought to have been offered into evidence based on the diagnostic samples taken for hospital use.

She then withdrew *more blood* at the **SPECIFIC REQUEST** of Officer Embree from the same needle

insertion and placed that second batch of blood in the containers provided by him and gave them back to him.

Officer Embree then took that sample back to the wreck scene and gave it to Officer Bastin. It was later transported to Frankfort to the Kentucky State Police laboratory where it was analyzed. The results showed that Helen's blood contained .13% alcohol, which is above the presumption provided by K.R.S. 189.520.

Prior to the trial, Helen's counsel asked for the suppression of the results of the blood test results as being in violation of her 4th, 5th, and 14th Amendment rights under the United States Constitution and Bill of Rights and her rights against unreasonable search and seizure and against self incrimination all as guaranteed by Section 10 and Section 11 of the Kentucky Constitution.

This motion was denied. Objections were again made during the trial and again were denied. The lower court admitted the testimony of the employee of the Kentucky State Police who made the tests and testified as to those results in front of the jury.

Helen was convicted of manslaughter in the second degree; three counts of assault fourth degree; and driving under the influence. The jury recommended the maximum sentence under all counts.

It is from this verdict and judgment that she appeals.

REASONS FOR GRANTING THE WRIT

ISSUE: THE COURT ERRED WHEN IT ADMITTED THE RESULTS OF A BLOOD TEST OF HELEN LAND, WHICH WAS TAKEN WITHOUT HER CONSENT AT A TIME WHEN SHE WAS UNCONSCIOUS AND NOT UNDER ARREST; WHEN SHE WAS NOT

UNDER SUSPICION OF COMMITTING A CRIME AND AT A TIME WHEN THERE WAS NO EVIDENCE THAT A CRIME WAS EVEN COMMITTED AND AT A TIME WHEN THERE WAS NO EVIDENCE SHE MAY HAVE BEEN INTOXICATED, ALL IN VIOLATION OF HER RIGHTS TO DUE PROCESS OF LAW UNDER THE 14th AMENDMENT, AND HER PRIVILEGE AGAINST SELF INCRIMINATION UNDER THE 5th AMENDMENT, AND HER RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE 4th AMENDMENT, INSOFAR AS THOSE RIGHTS ARE SECURED AGAINST THE STATES BY THE 14th AMENDMENT AND UNDER SECTIONS 10 AND 11 OF THE KENTUCKY CONSTITUTION.

Helen Land suffered a severe closed head injury and she has no memory concerning anything about the accident.

In addition, she remembers nothing about what happened to her at the hospital. In particular, she did not and, indeed, was incapable of giving the hospital permission to even treat her.

The treatment of any patient involved in a traumatic injury necessarily must include the taking of blood for routine diagnostic tests to determine allergies, blood type for transfusions, and many other vital statistics necessary in giving to her the best medical treatment possible. In many cases, a patient's life may depend upon an immediate and proper analysis of her blood.

In this case, Helen does not fault the hospital for taking her blood for the diagnostic purposes to save her life. However, the taking of her blood by an officer for use in subsequent criminal proceedings without her consent is a clear violation of her constitutional rights. The

State of Kentucky has utterly refused to protect Helen Land and has refused to even consider that her rights under the constitutional provisions cited may have been violated.

In addition to Helen's rights under the 4th, 5th, and 14th Amendments to the United States Constitution, Helen is entitled to enjoy the protections afforded under Section 10 of the Kentucky Constitution which provides as follows:

> *"The people shall be secure in their persons,* houses, papers and possessions, *from unreasonable search and seizure;* and no warrant shall issue to search any place, or *seize any person or thing,* without describing them as nearly as may be, nor *without probable cause supported by oath or affirmation.* (Emphas is added)

The pertinent portion of Section 11 of the Kentucky Constitution provides:

> "... He cannot be compelled to give *evidence* against himself..." (Emphas is added)

The taking of Helen's blood, without her consent, while she lay unconscious and helpless, was certainly compelling her to give *evidence* against herself in violation of Section 11 and was an unreasonable "search and seizure" under Section 10.

Kentucky has attempted to clarify an officer's responsibilities and obligations by two statutes that relate to the taking of blood in these situations.

The first is K.R.S. 186.565, set forth in its entirety in the Appendix at page 15a-19a. This statute in Section 1 basically provides that any person who drives in this state is deemed to have given his consent to a test of his blood

IF ARRESTED for any offense arising out of acts allegedly committed while under the influence. The statute requires the officer to provide the equipment. It **MUST BE NOTED THAT THIS STATUTE REQUIRES AN ARREST OF THE SUSPECT.**

In Section 2 of this statute, there is a provision which states that anyone who (after being arrested) is dead, unconscious, or incapable of giving the consent referred to in Section 1 is not deemed to have withdrawn the consent and the test may be given. The balance of this statute relates to the procedures taken for revoking the driver's license after refusal and appeals from decisions.

This statute shows the Kentucky Legislature wanted to place certain restrictions on the officer's right to take the blood test. It made certain that the officer must "arrest" the suspect. That means that the officer would have to have a reasonable belief that a crime had been committed **BEFORE** taking the test.

This particular statute did not apply in Helen's case because the statute specifically relates only to those situations in which the defendant is *actually arrested.* Helen Land was not under arrest at the time the blood test was taken. Therefore, the provisions of K.R.S. 186.565 cannot and do not apply. See *Marks* v. *Commonwealth*, Ky. App., 698 S. W. 2d 533, which held that K.R.S. 189.520 and K.R.S. 186.565 governs only "actions taken by law enforcement officers when the defendant is placed under arrest".

The second statute that relates to blood tests is K.R.S. 189.520, Appendix at page 19a-21a. This statute sets forth the "presumptions" for different percentages of alcohol in the blood. Sections 5 and 6 are the important ones and are set out verbatim:

"K.R.S. 189.520

(5) *No person may be compelled to submit to any test specified in subsection (3) of this section,* but his refusal to submit to such test shall result in revocation of his license as provided in K.R.S. 186.565 (3).

(6) Only a physician, registered nurse or qualified medical technician, duly licensed in Kentucky, *acting at the request of the arresting officer* can withdraw any blood of any person submitting to a test under this section or K.R.S. 186.565."

The rulings in Helen's case by the Kentucky Courts frustrate the intention of the Kentucky Legislature in these two statutes. It makes them meaningless.

The following facts are critical:

1. Helen Land was not capable of giving consent at the time the blood was taken from her as she was unconscious at the time.

2. Helen Land never gave consent to the blood test.

3. Helen Land was not under arrest at the time the blood was taken.

4. Officer Embree, who instructed Deborah Turner to take the blood, had no knowledge of the facts in regard to Helen Land. He was acting under the specific instruction of Officer Bostrom.

5. Officer Embree had no arrest warrant for Helen Land.

6. Officer Embree did not have a search warrant that authorized him to extract blood from Helen and none had been applied for.

7. At the time Officer Bostrom gave the instructions to Officer Embree, he had (1) *no belief,*

(2) *no reason to believe* and (3) *no feeling* that this accident may have been caused in part due to some intoxication either by substance abuse or alcohol.

8. At the time Officer Bostrom gave the instructions to Officer Embree, Officer Bostrom did not know who had been driving Helen's truck.

9. At the time Officer Bostrom gave the instructions to Officer Embree, Officer Bostrom had not focused his attention to Helen Land in regard to criminal activity. This was not done for at least two (2) additional days **AFTER** the blood test was taken.

10. Nurse Turner took a *first* blood sample for St. Joseph Hospital for diagnostic purposes and such sample was in fact used by St. Joseph Hospital and was not in any way used as evidence in this case.

11. Nurse Turner took a *second* sample at the specific request of Officer Embree just as the statute requires and this sample was given to the officer and was the basis for the test results which were introduced into evidence. It was never used for diagnostic purposes.

Similarly, Sections 10 and 11 of the Kentucky Constitution guarantees those same rights. It is patently clear that under those two sections, the results of a blood test would not be admissible in evidence in a criminal prosecution unless the defendant consented to the test. This is confirmed by the cases of *Sullivan* v. *Brawner,* 237 Ky. 730, 36 S.W.2d 364, and *McManus* v. *Commonwealth,* 264 Ky. 240, 94 S.W.2d 609. The *McManus* case specifically held that evidence obtained as a result of a physical examination is inadmissible unless acquired with the specific approval of the accused.

Kentucky has acted on this subject in many cases. Although there are no cases exactly on all points, many of them decisively point out the fact that the decision by the Court of Appeals was in error.

The closest case to our facts is the case of *Washburn* v. *Commonwealth,* Ky. 433 S. W. 2d 859 (1968). In this case the defendant was the driver of a vehicle which collided head-on with another vehicle, killing the driver of the second vehicle. The defendant was taken to the hospital where he was treated for serious injuries. The officer appeared at the hospital and stated that he "thought" he smelled a faint odor of alcohol, but couldn't be sure. He did not place the defendant under arrest at that time. However, he intended to make the decision of *whether* to arrest him based on the results of the blood test. The court ruled:

> "It is our opinion that *there was no sufficient cause here to warrant a taking of the blood test without consent,* under the *Schmerber* rules relating to search and seizure." (Emphasis added)

The court affirmed the decision on the grounds that there was a *factual* question relating to whether or not Washburn had actually consented.

Another leading case is the case of *Hovious* v. *Riley,* Ky., 403 S. W. 2d 17, (1966). In this case the court made a ruling *implying* that taking a blood test without consent would violate the privilege against self-incrimination guaranteed by Section 11 of the Kentucky Constitution. This case was decided prior to the effective date of K.R.S. 186.565, but this fact is irrelevant since K.R.S. 186.565 relates only to those drivers who have been **ARRESTED.**

Therefore, the *Washburn* and *Hovious* cases are clear authority for reversing the Helen Land case.

The Kentucky Court of Appeals made its error in getting hung up over the words, "diagnostic sample". It erroneously applied *Marks* v. *Commonwealth,* Ky. App., 698 S. W. 2d 533, to the facts in our case. This was clearly an error.

In *Marks,* the defendant had been taken to Humana Hospital for treatment following the accident. The hospital then administered a blood test as part of its routine diagnostic procedure. The results of that test revealed a blood alcohol content of .27%. However, in this case, the officer was not even present when the blood was drawn. In fact, he did not even request that it be made. The lower court used this case as authority to declare that the test in Helen's case had been taken for diagnostic purposes and thus could be admitted into evidence.

Nothing could be further from the truth. *Marks* is easily distinguished from Helen's case on several points:

1. In *Marks,* the test was made by the hospital. In Helen's case the test was made by the Kentucky State Police at the request of Officer Bostrom.

2. In *Marks,* the officer did not request the blood test. In Helen's case the officer specifically did request the test.

3. In *Marks,* the blood sample was never given to the police. In Helen's case the officer took the blood as soon as it was withdrawn from Helen's arm.

4. In *Marks,* the blood for the diagnostic purposes was also used for the blood alcohol test. In Helen's case the blood drawn for diagnostic purposes was never in the possession of the police and the results were never introduced into evidence.

With the above comparisons, it is clear that the lower court's decision must be overruled as the court simply misinterpreted the facts of the two cases.

The Kentucky Court of Appeals has effectively placed its citizens in a very precarious position by the *Marks* case and by its ruling in Helen's case.

For example, take the case of a person who is driving after having a few drinks and has an accident in which he is injured. Even without an officer being present, he must make the decision of whether or not to allow the taking of his blood for diagnostic purposes. For if he does, the results may afterward be used by the state to prosecute and convict him. Does he choose to not accept this diagnostic procedure at a risk to his life or accept it and risk going to jail later?

Citizens should not have to make such choices when we still have Sections 10 and 11 of the Kentucky Constitution. However, the Kentucky Courts have all but revoked Sections 10 and 11 with their rulings in Helen Land's case.

So, in effect, what we have here, is the taking of blood from a citizen who was not under suspicion for the commission of any crime, at a time when she was incapable of giving consent and at a time when she **WAS NOT UNDER ARREST.** The blood used for the test was not taken for diagnostic purposes, but was taken at the specific request of Officer Embree, who had no knowledge of the facts of the accident. These facts were all given by the commonwealth's own witnesses.

The overriding function of the Fourth Amendment to the Constitution of the United States (Appendix,

Page 13a) is to protect personal privacy and dignity against unwarranted intrusion by the states, including Kentucky. In *Wolf* v. *Colorado.* 338 U.S. 25, 93 L. Ed 1782, 69 S. Ct. 1359, the Supreme Court recognized "the security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society". This was reaffirmed by the Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed 2d 1081, 81 S. Ct. 1684, 84 ALR 2d 933.

The Fourth Amendment provides that "the right of the people to be secure in their *persons,* houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." (Emphas is added)

However, the rights granted under these constitutional amendments have been eroded somewhat in certain limited factual situations. The leading case on this is the case of *Schmerber* v. *State of California,* 384 U.S. 757, 16 L. Ed 2d 908, 86 S. Ct. 1826. In this case the Supreme Court rejected the claimed rights of the defendant who was convicted of DUI based on a blood sample drawn at a hospital by a physician (over the protests of the defendant) at the direction of a police officer, *while the defendant was under arrest.*

The *Schmerber* case is easily distinguished from our particular case. In *Schmerber,* the defendant was at the hospital and had *already been arrested* and there was probable cause for the arrest. In Helen's case, she had not been arrested and there was no probable cause to even believe a crime had been committed at the time of the test. The *Schmerber* case is noteworthy for the final comment by the court:

> "We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that *we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society.* That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions *in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.* (Emphas is added)

It is admitted that *Schmerber* ruled that the 5th Amendment is not implicated by the taking of blood samples from *the suspect of a crime.*

But the question placed squarely before this Court on this Petition is whether *Schmerber* can now be expanded as authority to take blood samples from an *unconscious person* who is not under arrest, not a suspect, and at a time when there is not even a suspicion that a crime was committed?

Kentucky, by the rulings of its Court of Appeals and the denial of a Petition for Discretionary Review by the Supreme Court of Kentucky, has held that such procedures do not violate the United States Constitutional Amendments or Sections 10 and 11 of the Kentucky Constitution. This Court must not let this holding go unchallenged.

It must be remembered that *Schmerber* was a 5 to 4 decision. And, it contains a warning to the states (which Kentucky has ignored) that its holding in no way indicated that it would permit more substantial intrusions or intrusions under other conditions.

It is time that *Schmerber* be reviewed by this Court. This decision was decided in 1966 by a 5 to 4 decision. The dissents were compelling.

The states, certainly including Kentucky, need to know the limits of police officers in investigating automobile accidents involving alcohol or substance abuse. This problem is almost overwhelming and at the present time, *Schmerber* is being interpreted as giving police officers an open invitation to all kinds of abuses. It must be cleared up now. The states need direction from the United States Supreme Court.

Justice Warren dissented on the ground that the conviction violated the due process clause of the 14th Amendment .

Justice Black, joined by Justice Douglas, dissented on the further ground that the defendant's constitutional right against self-incrimination had been violated.

Justice Douglas, in a separate opinion dissented on the basis that the due process clause of the 14th Amendment was violated and that the compulsory blood test clearly invaded the right of privacy protected by the 4th and 5th Amendments.

Justice Fortas dissented on the grounds that the privilege against self incrimination applied, and that under the due process clause, the state, as prosecutor, had no right to extract blood from any person, over his protest. (Would there be a similar result if the person were unconscious and could not protest?)

These dissents are worthy of this Court's notice and with the new makeup of the Court, direction is sorely needed by every state in the union.

CONCLUSION

It is frightening to realize that Kentucky is now allowing police officers to take blood for later criminal prosecutions from unconscious citizens, who are not under arrest and who are not even under suspicion of committing a crime. This is dangerously close to the tactics used in a police state.

If the state of Kentucky refuses to acknowledge the rights and privileges of our United States Constitution and the Kentucky Constitution, its citizens must call on the United States Supreme Court for protection.

It is for these reasons that the Petitioner respectfully prays that this Court will issue a Writ of Certiorari to review the Final Opinion of the Kentucky Court of Appeals.

Respectfully submitted:

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APPENDIX

April 20, 1989

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FOURTH DIVISION

COMMONWEALTH OF
KENTUCKY PLAINTIFF

VS: **FINAL JUDGMENT** N0.88CR-605

SENTENCE OF IMPRISONMENT

HELEN M. LAND DEFENDANT
CHARGE: Ct. l: Manslaughter 2nd Degree
Cts. 2-4: Assault 4th Degree
Ct. 5: Driving Under the Influence

* * * * * * * * * * *

The defendant having entered a plea of not guilty, and on the 14th day of March, 1989, a jury having returned a verdict that the defendant was guilty of the crime of Ct. l: Manslaughter 2nd Degree, Cts. 2-4: Assault 4th Degree and Ct. 5: Driving Under the Influence, and fixed her sentence at ten (10) years on Ct. 5: twelve (12) months and a $250.00 Fine on each Cts. 2 and 3, a Fine of $500.00 on Ct. 4 and thirty (30) days and a Fine of $500.00 on Ct. 5

On this 14th day of April, 1989, the defendant, Helen Land, appeared in open Court with her attorney, Hon. Fred Fugazzi, Jr. Mrs. Kathy Tewell, the official court recorder of this Court, mechanically recorded the testimony and proceedings of this hearing and the Court inquired of the defendant and her counsel whether they

had any legal cause to show why judgment should not be pronounced, and afforded the defendant and her counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court informed the defendant and her counsel of the factual contents and conclusions contained in the written report prepared by the Division of Probation and Parole, and the Court having given due consideration to the report prepared by the Division of Probation and Parole, and the defendant having been given time within which to controvert the factual contents and conclusions contained in said report, and the Court having given due consideration to the nature and circumstances of the crime, and to the history, character and condition of the defendant, and the Court having considered a sentence of probation and a sentence of conditional discharge is of the opinion that imprisonment is necessary for the protection of the public because probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime and due to the seriousness of the crime.

No sufficient cause was shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant, and it is therefore **ORDERED AND ADJUDGED BY THE COURT** that the defendant is guilty of the crime of Ct.1: Manslaughter 2nd Degree, Cts. 2-4: Assault 4th degree and Ct. 5: Driving Under the Influence, and her sentence shall be an indeterminate sentence, the maximum of which shall be ten (10) years on Ct.1 and a definite term of twelve (12) months and a Fine of $250.00 on Each Ct. 2 and 3; a Fine of $500.00 on Ct. 4: and thirty (30) days and a Fine of $500.00 on Ct. 5 in the State Penitentiary as hard labor; and

It is further **ORDERED BY THE COURT** that the Sheriff of Fayette County shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

After imposing sentence, the Court informed the defendant that she has a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if she were financially unable to afford an appeal, a record would be prepared for her at public expense and counsel would be appointed to represent her, that an appeal must be taken within ten (10) days of the date of this judgment and that the Clerk of the Court would prepare and file a notice of appeal on her behalf within that time if he so requests. Pending appeal the defendant is remanded to custody.

It is further **ORDERED AND ADJUDGED** that the defendant is hereby credited with time spent in custody prior to the commencement of sentence, namely, 38 days towards service of the maximum term of imprisonment.

It is further **ORDERED** that the defendant pay Fayette Circuit Court a crime victim's compensation fee of $10.00 and court costs of $56.00.

It is further **ORDERED BY THE COURT** that the sentence imposed on Cts. 2, 3, 4 and 5 shall run concurrently with each other and concurrently with Ct.1 for a total sentence of ten (10) years which shall run consecutively with any other previous felony sentence the defendant must serve.

/s/ L. T. Grant
JUDGE, FAYETTE CIRCUIT COURT

NOTICE

The foregoing Judgment was entered on the 20th day of April, 1989.

Robert M. True, C.F.C.C.
By: /s/ Huebert, D.C.

TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT
By: /s/ K. Clifton, Deputy

The foregoing Judgment and notice of entry was served upon the defendant by mailing a true copy to the Hon. Fred Fugazzi, Jr., attorney of record, postage prepaid, this 20th day of April, 1989.

By: /s/ Huebert, D.C.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 89-CA-1023-MR

HELEN M. LAND — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE L. T. GRANT, JUDGE
ACTION NO. 88-CR-605

COMMONWEALTH
OF KENTUCKY — APPELLEE

AFFIRMING

** ** ** ** **

BEFORE: HOWERTON, Chief Judge, DYCHE, and REYNOLDS, Judges.

REYNOLDS, JUDGE. This is an appeal from a judgment and conviction of second-degree manslaughter, assault and DUI arising out of a motor vehicle collision.

On the night of July 29, 1988 two pickup trucks collided on a Fayette County road. One pickup was driven by Raymond Harris and the other by appellant. A passenger in the Harris pickup, Craig Moberly, died as a result of head and chest injuries and three other persons sustained injuries. Appellant was transported to St. Joseph Hospital in Lexington and arrived in a semicomatose state and unresponsive to questioning. When Officer Horace Embree sought authorization from the accused to draw blood, she did not respond. At this time a hospital technician, Deborah Turner, drew blood from appellant for diagnostic purposes and gave part of the sample to Officer Embree upon his request. Turner subsequently

testified that she would have drawn blood from appellant even if not requested by Embree. The police requested the blood from appellant and her passenger as part of routine accident investigation. Criminal charges were not brought until appellant later told Officer Eric Bostrum she was driving the truck and had imbibed two drinks.

Appellant objected to the introduction of a recorded conversation she had with Officer Bostrum. She stated that she recalled an officer with a recorder visiting her in the hospital, but did not remember any conversation. The tape recording, however, showed appellant alert and responsive in her answers, even correcting Bostrum on addresses. After appellant admitted driving the truck, she was advised of her constitutional rights. Appellant continued talking, however, and admitted drinking earlier in the evening at the Village Pub.

Subsequently a jury found appellant guilty of second-degree manslaughter, fourth-degree assault (three counts) and driving under the influence for which she was sentenced to ten years' imprisonment.

Appellant states that the blood taken at the hospital was improperly drawn and resulted in violations of her due process rights under the Fourteenth Amendment, her privilege against self-incrimination under the Fifth Amendment, and her rights against unreasonable searches and seizures under the Fourth Amendment and Sections 10 and 11 of the Kentucky Constitution via the Fourteenth Amendment.

We find a critical factor in determining whether appellant's rights have been violated as claimed lies in the reasons for the blood being drawn. Appellant claims blood was not drawn for diagnostic purposes and as such would

exclude the use of *Marks* v. *Commonwealth,* Ky. App., 698 S.W.2d 533 (1985). In *Marks, supra* blood was drawn by the hospital for diagnostic purposes without the presence of any police officers. It was not taken at the request of the police and no arrest was made nor did probable cause exist to make an arrest. The court found the alcohol level found in Marks' blood as acceptable in evidence as it was drawn for routine diagnostic purposes.

In this case Turner testified that the blood that was drawn was to be done regardless of the presence of Officer Embree. She testified that appellant was stuck only once for the removal of blood. Appellant contends that this blood was not drawn for diagnostic purposes, but specifically for police investigation.

Had no blood been drawn by the hospital and the officer demanded a blood sample for police investigation, then a situation as appellant perceives would exist. This record demonstrates that blood was initially drawn by the hospital for diagnostic purposes and as such the portion received by Embree remains under the umbrella of hospital diagnostic purposes. To this end *Marks* is applicable.

In *Breithaupt* v. *Abram*, 352 U.S. 432 (1957), defendant's car collided with another car killing its three occupants. While at the hospital a police officer requested a blood sample from defendant. The doctor complied and after the blood was analysis the driver was charged with manslaughter. *Breithaupt, supra* espoused:

> [T] here is nothing "brutal" or "offensive" in the taking of a sample of blood when done, an (sic) in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent,

> without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate.
>
> We therefore conclude that a blood test taken by a skilled technician is not such "conduct that shocks the conscience;" nor such a method of obtaining evidence that it offends a "sense of justice."

Alcohol used when driving is a danger that should be recognized by every facet of society. The *Breithaupt, supra* court recognized it as such and declared:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind of which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.

The result is that appellant's blood was properly drawn by a qualified technician for diagnostic purposes and used by police for routine accident investigation.

We simply find no intent, express or otherwise, that KRS 189A.O10 repeals KRS 507.040 and KRS 508.030. The collision involving appellant's intoxication gave rise to several charges including wanton manslaughter, fourth-degree assault and driving under the influence. The language in 189A.010 does nothing in the way of repealing the effectiveness or application of other statutes and merely provides for prosecution of other offenses in addition to driving under the influence.

Although appellant claims error as to the admission of exhibit 18, a photograph of the accident showing the inside of a pickup truck containing the deceased, we hold that the photo is not "gory" and "gruesome" nor is it prejudicial. *Gali* v. *Commonwealth,* Ky., 607 S. W. 2d 97 (1980). In this photograph the arm of the victim is seen draped over the tire of appellant's vehicle, which impacted with him. It is proper to show jurors "the body of the decedent and the condition or place in which found." *Napier* v. *Commonwealth,* Ky., 426 S. W. 2d 121 (1968). The picture portrayed a fair representation of the evidence which was sought to be introduced and the jury was in no way overwhelmed by repetitive photographs. *Morris* v. *Commonwealth,* Ky., 766 S. W. 2d 58 (1989).

The judgment is affirmed.

HOWERTON, J. CONCURS.

DYCHE, J. CONCURS IN RESULT.

ATTORNEY
FOR APPELLANT:

Bobby G. Wombles
Lexington, KY

ATTORNEYS
FOR APPELLEE:

Frederic J. Cowan, AG
Carol C. Ullerich, AAG
Frankfort, KY

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

89-CA-1023-MR

HELEN M. LAND — APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE L. T. GRANT, JUDGE
ACTION NO. 88-CR-605

COMMONWEALTH
OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, Chief Judge; DYCHE and REYNOLDS, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is **ORDERED** that the same is hereby **DENIED**.

ENTERED JULY 20, 1990

/s/ J. W. Howerton
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

90-SC-612-D
(89-CA-1023)

HELEN LAND — MOVANT

v. FAYETTE CIRCUIT COURT
88-CR-605

COMMONWEALTH
OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED December 19, 1990.

/s/ Robert F. Stephens
CHIEF JUSTICE

January 17, 1991

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FOURTH DIVISION

COMMONWEALTH OF KENTUCKY, PLAINTIFF

ORDER

VS: N0 88CR-605
HELEN M. LAND DEFENDANT

* * * * * * * * *

It is hereby **ORDERED BY THE COURT** that the hearing for imposition of sentence in the above styled case shall be continued until March 22, 1991 at 1:00 p.m.

Date this 16th day of January, 1991

/s/ John Adams
JUDGE, FAYETTE CIRCUIT COURT

Attested copies mailed this 17
day of January, 1991 to:

A TRUE COPY
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

By: /s/ K. Cook, Deputy

Commonwealth Attorney
Hon. Bobby Wombles
Jail
Sheriff
Probation and Parole
Defendant- 530 Crumbaugh Rd., Georgetown Ky., 40324
Surety - Dorothy Land - 530 Crumbaugh Rd.,
Georgetown Ky.
Lynn - Docket Clerk

By: /s/ Katrina Cook, D.C.

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[UNREASONABLE SEARCHES AND SEIZURES]

Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS]

Criminal actions; Provisions concerning; Due process of law and just compensation clauses. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV
[Citizen's Rights]

Section 1. Citizenship; Due process; Equal protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF KENTUCKY

§ 10. Security from search and seizure — Conditions of issuance of warrant. — The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

§ 11. Rights of accused in criminal prosecution — Change of venue. — In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall

have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

186.565. Consent to test for alcohol in blood — Procedure upon refusal — Ruling — Judicial review — Exception — Application to court to enter driver's education program. — (1) Any person who operates a motor vehicle in this state is deemed to have given his consent to a test of his blood, breath, urine or saliva for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability. The test shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substance which may impair one's driving ability. The law enforcement agency by which the officer is employed shall designate which of the aforesaid tests shall be administered, and provide necessary equipment. The state shall provide one (1) breathalizer and simulating unit for each county, paid for by state funds.

(2) Any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal is deemed not to have withdrawn the consent provided in subsection (1) of this section and the test may be given.

(3) If a person under arrest refuses upon the request of a law enforcement officer to submit to a test designated by the law enforcement agency as provided in subsection (1) of this section, the requesting officer shall warn the person of the effect of his refusal to submit to the test. If the person again refuses, none shall be given, but the transportation cabinet, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability, that the person refused to submit to the test upon the request of the law enforcement officer, and that the person again refused to submit to the test after the law enforcement officer warned him of the effect of his refusal, the cabinet shall immediately serve notice upon said person in writing by mailing the notice to the person by certified mail to the last known residence address of the person or if the address is unknown, to the last known business address of the person to appear before the secretary or his duly authorized agent and show cause why his license to operate a motor vehicle, or if said person is a nonresident his privilege to operate a motor vehicle within this state should not be revoked; or if the person is a resident without a license or permit to operate a motor vehicle in this state why that persorl should not be denied the issuance of a license or permit. The hearing shall be schedulcd as early as practical but not sooncr thall ten (10) days after thc issuance of the notice and at a tirne and place designated by the secretary.

(4) For the purpose of the hearing, held in accordance with the order to show cause, the secretary may appoint an examiner who shall have the power to preside at the

hearing. Upon the hearing the secretary or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. The scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages or other substances which may impair one's driving ability, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. All testimony at the hearing shall be recorded. The secretary's ruling shall include a statement of the findings of fact, rulings of law and other matters pertinent to the question at issue. The secretary within ten (10) days after the completion of the hearing shall order either: that the person's license to operate a motor vehicle, or, if the person is a nonresident, his privilege to operate a motor vehicle within this state be revoked for a period of not more than six (6) months or if the person is a resident without such license that there should be a denial of issuance of a license for a period of not more than six (6) months; or that no action be taken regarding said person's privilege to operate a motor vehicle. The secretary shall immediately notify the person of his ruling in writing by certified mail. If the person shall fail to attend the show cause hearing without good cause shown the secretary shall forthwith revoke the person's license or privilege to operate a motor vehicle or deny issuance of a permit or operator's license.

(5) If the revocation or determination that there should be a denial of issuance is sustained after the

hearing, the person whose license or permit to drive or nonresident operating privilege has been revoked, or to whom a license or permit is denied, under the provisions of this section, may file a petition in the circuit court of the county in which the person resides or in the circuit court of the county in which the alleged offense was committed or in Franklin Circuit Court to review the final order of revocation or denial by the secretary within twenty (20) days after the final order has been issued. The perfected appeal suspends the order of revocation pending a final determination of the review. If the final judgment of the court finds against the person appealing, the period of revocation is determined by taking into account the period of time during which the revocation was effective before the appeal was perfected. The transportation cabinet shall file with its answer a copy of the secretary's ruling and a transcript of evidence. The court's review is limited to whether the secretary's ruling is supported by substantial evidence and whether his action is arbitrary or capricious. An appeal to the Court of Appeals suspends the order of revocation pending a final determination of the review. If the final judgment of the court finds against the person appealing, the period of revocation is determined by taking into account the period of time during which the revocation was effective before the appeal was perfected.

(6) When it has been finally determined that a nonresident's privilege to operate a motor vehicle in this state has been revoked, the cabinet shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license. The provisions of this section shall not apply to a person who refuses to submit to a test of his blood, breath, urine or saliva if that person

has enrolled in a driver's education program under the terms and conditions of KRS 186.560(5) and rules and regulations adopted thereunder.

(7) Any person who has had no previous conviction for violation of KRS 189.520 and who has refused to submit to a test of his blood, breath, urine, or saliva may apply to a district court of competent jurisdiction for permission to enter a driver's education program as provided pursuant to KRS 186.560. If he is permitted by the court to enter the program he shall be subject to the same terms and conditions as any other person entering the program. The cabinet shall suspend the license for six (6) months of any person participating in such program if he fails to satisfactorily complete such driver's education program. (Enact. Acts 1968, ch. 184, §§ 1 to 6;1970, ch. 238, § 1; 1974, ch. 74, Art. IV, § 20(7), (8); 1976, ch. 29, § 1, effective March 5, 1976; 1978, ch. 157, § 1, effective June 17, 1978; 1980, ch. 103, § 2, effective July 15, 1980; 1980, ch. 114, § 33, effective July 15, 1980; 1984, ch. 165, § 16, effective July 13, 1984.)

189.520. Operating vehicle while under influence of intoxicants or substance which may impair driving ability prohibited — Presumptions concerning intoxication. — (l) No person under the influence of intoxicating beverages or any substance which may impair one's driving ability shall operate a vehicle that is not a motor vehicle anywhere in this state.

(2) No peace officer or state police officer shall fail to enforce rigidly this section and KRS 189A.O10 through 189A.O90.

(3) In any criminal prosecution for a violation of KRS 189A.O10 or subsection (l) of this section, wherein the defendant is charged with having operated a vehicle while

under the influence of intoxicating beverages, the amount of alcohol in the defendant's blood as determined at the time of making an analysis of his blood, urine, breath or other bodily substance, shall give rise to the following presumptions:

(a) If there was 0.05 percent (5/100%) or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages;

(b) If there was more than 0.05 percent (5/100%), but less than 0.10 percent by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant;

(c) If there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages.

(4) The provisions of subsection (3) of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the defendant was under the influence of intoxicating beverages.

(5) No person may be compelled to submit to any test specified in subsection (3) of this section, but his refusal to submit to such test shall result in revocation of his license as provided in KRS 186.565(3).

(6) Only a physician, registered nurse or qualified medical technician, duly licensed in Kentucky, acting at the request of the arresting officer can withdraw any blood of any person submitting to a test under this section or KRS 186.565.

(7) The person tested shall be permitted to have a duly licensed physician of his own choosing administer a test in addition to the one adminis-tered at the direction of the police officer. (2739g-34, 2739g-34a, 2739g-34b: amend. Acts 1946, ch. 209; 1954, ch. 74; 1958, ch. 126, § 24; 1968, ch. 184, § 7; 1984, ch. 165, § 18, effective July 13, 1984.)

Supreme Court, U.S.
FILED
MAY 2 1991
OFFICE OF THE CLERK

NO. 90-1638
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HELEN LAND PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FREDERIC J. COWAN
ATTORNEY GENERAL

CAROL C. ULLERICH
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CRIMINAL APPELLATE DIVISION
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FRANKFORT, KY 40601-3494
(502) 564-7600

COUNSEL FOR RESPONDENT

May 2, 1991

NO. 90-1638
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HELEN LAND PETITIONER

VS. NOTARIZED STATEMENT

COMMONWEALTH OF KENTUCKY RESPONDENT

The affiant, after being duly sworn, states the following facts:

1) On May 2, 1991, the affiant mailed, postage prepaid, forty copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari, properly addressed to the Honorable William K. Suter, Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.

2) On that same day the affiant also served counsel for petitioner with 2 copies of the Brief in Opposition.

3) On May 6, 1991, the affiant was contacted by the U. S. Supreme Court Clerk's Office and directed to refile the Brief in Opposition in booklet form. The affiant has complied with this request on this date and served two copies on opposing counsel.

Further the affiant sayeth not.

Carol C. Ullerich

CAROL C. ULLERICH
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KY 40601-3494

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by Carol C. Ullerich on this the 8th day of May, 1991.

Susan Foster

NOTARY PUBLIC, STATE AT LARGE

My commission expires: 10-6-94

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether blood, properly drawn by a qualified hospital technician for diagnostic purposes and used by police for routine accident investigation, is admissible to establish the blood alcohol concentration of an individual subsequently charged with drunk driving?

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NO. 90-1638
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

HELEN LAND PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion below is correctly set forth in petitioner's appendix. The decision is unpublished.

JURISDICTION

The jurisdictional facts are correctly set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are correctly set forth in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions are set forth correctly in the petition.

COUNTERSTATEMENT OF THE CASE

Two pickup trucks collided on a Fayette County, Kentucky road. One vehicle was driven by Raymond Harris. The other was driven by petitioner. Craig Moberly, a passenger in the Harris truck, died from upper chest and head injuries caused by the left front tire of petitioner's truck as it penetrated Harris' windshield. In addition to petitioner and Harris, two other passengers sustained numerous injuries.

Petitioner was transported to St. Joseph Hospital in Lexington. While in the Emergency Room, Officer Horace Embree attempted to get authorization from her to draw a blood sample.

Petitioner was incapacitated, but not comatose. She did not consent to the blood sample which Deborah Turner collected for the hospital's diagnostic purposes. Turner testified she stuck petitioner once but drew blood for both the hospital lab and the police. Turner also said she would have drawn the blood even if Embree had not requested it.

When Embree was dispatched to collect blood samples from petitioner and her passenger, Virginia Madelung, police were uncertain which woman was driving petitioner's truck. Police requested the blood as part of their routine accident investigation. Petitioner had not been placed under arrest. Criminal charges were not anticipated until later when petitioner told Officer Eric Bostrum she was

driving the truck and had imbibed two drinks. This conversation occurred at 5:30 a.m. on July 30, 1988. The collision is believed to have happened at 10:05 p.m. on July 29, 1988.

Petitioner objected to introduction of her tape recorded statement to Bostrum. In fact, a pretrial suppression hearing was convened in which petitioner testified that she had no memory of the crash. She recalled an officer with a recorder visiting her but did not remember her conversation with him. The tape proves petitioner was alert and responsive when she spoke with Bostrum. She corrected the officer when he mentioned an old address for her and she related several details about the previous night including the fact that she was driving

Madelung to her home on West Second Street. Once petitioner admitted driving the truck, she was advised of her Constitutional rights. She was specifically told she could stop talking at any time and that repercussions could result from the officer's questions. Petitioner continued talking and admitted she had been drinking at the Village Pub.

Chemist Terry Comstock testified petitioner's blood alcohol concentration measured .13%. A 750 ml. whiskey bottle was found in petitioner's cab.

A Kentucky jury found petitioner guilty of second-degree manslaughter, fourth-degree assault (three counts) and driving under the influence. The trial court accepted the

jury's verdict and sentenced petitioner in accordance with the jury's recommendations. Petitioner is serving a maximum sentence of ten (10) years.

This collision, which resulted in death and severe injuries to four people, occurred on July 29, 1988. On February 16, 1989, petitioner was again charged with driving under the influence; this time she was in Georgetown, Kentucky.

In an unpublished opinion, the Kentucky Court of Appeals unanimously affirmed the conviction. One of three issues argued by petitioner was whether the blood sample drawn for police by the medical technician from the same needle puncture used to draw a sample for the hospital constituted an unreasonable search and seizure. The appellate court

found a critical factor in determining whether constitutional violation occurred to be the purpose for drawing the blood. The court concluded the blood was properly drawn by a qualified hospital technician for diagnostic purposes and was also used by police for routine accident investigation. Thus, no constitutional violation occurred. A petition for rehearing was denied by the Kentucky Court of Appeals. Discretionary review of the opinion was denied by the Kentucky Supreme Court. This petition for certiorari followed. Additional relevant facts will be developed during the following argument.

ARGUMENT

PETITIONER'S BLOOD WAS PROPERLY DRAWN FOR DIAGNOSTIC PURPOSES AND ROUTINE ACCIDENT INVESTIGATION; THE TEST RESULTS WERE PROPERLY ADMITTED AT TRIAL.

Contrary to petitioner's claim, the Kentucky trial court correctly

admitted the results of petitioner's blood alcohol test under Marks v. Commonwealth, Ky.App., 698 S.W.2d 533 (1985). Marks was convicted of second-degree manslaughter. Following an accident, hospital personnel performed a routine blood test on Marks as part of their normal diagnostic procedures. When the blood was drawn from Marks, no police officers were present, it was not taken at their request, no arrest had been made, nor did probable cause exist to make an arrest. Id., at 318. Since the blood was drawn for routine diagnostic purposes, the Kentucky Court of Appeals found no error in admitting analysis of the blood at trial.

Marks is much like the case at bar. Following the crash, petitioner

was transported to the hospital. Officer Bostrum directed Officer Embree, via radio, to collect blood samples from petitioner and Virginia Madelung. This directive was issued before the suspicion of intoxication was formed. Taking a blood sample from those injured in the wreck was a standard procedure due to the seriousness and complexity of the collision. No charging decision had been made when petitioner's blood was drawn. Neither petitioner nor Madelung had been charged with driving under the influence when Deborah Turner collected the blood sample.

Turner testified she would have drawn blood for the hospital's own diagnostic purposes even if Officer Embree had not requested it. Turner stuck petitioner only once but drew

sufficient blood for the hospital and for the police. Officer Embree followed Turner to the witness stand. He testified blood was drawn from petitioner at approximately 12:30 a.m. on July 30, 1988. He described petitioner as incapacitated but not comatose. She would not respond to his questions and was unable to authorize the blood sample. Over a defense objection, chemist Terry Comstock testified petitioner's blood alcohol concentration was .13%. Since Turner testified she drew the blood for routine diagnostic purposes, Marks controls the issue and there was no error. Further, it must be stressed the blood was not drawn specifically for use at trial because no charging decision had been made at the time the blood was drawn.

The drawing of the blood was not an unreasonable search and seizure violative of the United States Constitution.

Kuzmiak v. Flowers, Ky., 580 S.W.2d 226 (1979) provides further support for admitting the blood analysis. In Kuzmiak, a wrongful death action, the Kentucky Supreme Court approved the taking of a blood sample from a decedent in a vehicular accident. Finding blood alcohol tests to be essential to highway accident investigation, it was held that "taking a blood sample from the body of any person killed in an automobile accident falls within the legitimate scope of an investigating law enforcement officer's inquiry to seek out the cause of death." Id., at 227. The luck and

fortuity of surviving a crash does not diminish the value of blood samples from those who do not die as a result of an accident. Thus, under both Kuzmiak and Marks, petitioner's blood was properly drawn for hospital diagnostic purposes and routine accident investigation. The test results were correctly introduced at trial. See also Woosley v. Central Uniform Rental, Ky., 463 S.W.2d 345, 349 (1971) indicating the drawing of blood for routine accident investigation is permissible. Petitioner's cited case of Washburn v. Commonwealth, Ky., 433 S.W.2d 859 (1963) is inapposite. Washburn was rendered prior to enactment of KRS 186.565. The opinion acknowledges considerations may be entirely different after adoption of that statute. Id., at 861.

Petitioner's Fifth Amendment claim is resolved adversely to her by Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The withdrawal of blood does not compel an individual to provide communicative or testimonial proof. 384 U.S. at 761, 16 L.Ed.2d at 914.

Because Schmerber was already under arrest when his blood was drawn, that decision does not answer petitioner's Fourth Amendment claim. Nevertheless, the Constitution "does not guarantee freedom from all arrests or seizures, only unreasonable ones." Cook v. Commonwealth, Ky., 649 S.W.2d 198 (1983). In Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), the defendant's pickup collided with a car killing its three occupants

and seriously injuring defendant. A nearly empty pint whiskey bottle was found in the glove compartment of the pickup. 352 U.S. 433, 1 L.Ed.2d at 449. Unconscious, Breithaupt was taken to a hospital emergency room where a police officer smelled liquor on the defendant's breath. The officer requested a blood sample and the attending physician obliged the request. After the blood had been tested, Breithaupt was charged with manslaughter. This Court concluded:

> . . . there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the

> taking a violation of a constitutional right; and certainly the test as (sic) administered here would not be considered offensive by even the most delicate.
>
> . . .
>
> We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience;' nor such a method of obtaining evidence that it offends a 'sense of justice.' (Citations omitted).

Id., 352 U.S. 435-437, 1 L.Ed.2d at 451-452. It is unclear if Breithaupt was formally arrested prior to the drawing of his blood. However, it is clear he was not charged until his blood had been tested. The formality of arresting an unconscious person is not a magical incantation that will suddenly stir the individual into refusing consent. The act of placing an

individual under arrest should not be so pivotal as to impede accident investigation under Kuzmiak. Recognizing the danger alcohol represents, this Court in Breithaupt went on to say:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of

> deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.

Id., at 453. Petitioner's blood was properly drawn by a qualified technician for diagnostic purposes and sought by police for routine accident investigation. The lack of a formal arrest did not transform this routine procedure into an unreasonable search and seizure. The blood test results were correctly introduced at trial. Petitioner's conviction was correctly affirmed by the Kentucky Court of Appeals. All issues were fully and

correctly decided below. The cases cited by petitioner are distinguishable on their facts. This Court should deny the petition for a writ of certiorari.

CONCLUSION

The drawing of blood for diagnostic purposes and routine accident investigation did not constitute an unreasonable search and seizure. The petition for a writ of certiorari should be swiftly denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Carol C. Ullerich, a member of the bar of the United States Supreme Court, hereby certify that two copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari have been mailed, first class postage prepaid, to Hon. Bobby G. Wombles, 201 W. Vine St., Lexington, Ky. 40507, Counsel for Petitioner, this 2nd day of May, 1991.

I further certify that 40 copies of the Brief for Respondent in Opposition to Petition for Writ of Certiorari have been mailed, first class postage prepaid, to Hon. William K. Suter, Clerk, United States Supreme Court, One First Street, N. E., Washington, D.C. 20543 for filing this 2nd day of May, 1991.

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